IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 689

TIMES FILM CORPORATION, A NEW YORK CORPORATION,
Petitioner,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, RICHARD J. DALEY, AND TIMOTHY J. O'CONNOR,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

FELIX J. BILGREY,
144 West 57th Street,
New York 19, New York,

ABNER J. MIKVA,
231 South La Salle Street,
Chicago 4, Illinois,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 180 F. Supp. 843 (1959) (R. 27). The opinion of the Court of Appeals for the Seventh Circuit is reported at 272 F. 2d 90 (C. A. 7th, 1959) (R. 37).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered November 27, 1959 (R. 42). The Petition for Certiorari was filed on February 10, 1960, and granted on March 21, 1960. The Court's jurisdiction rests on 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Are those sections of the Chicago licensing ordinance which require motion pictures to be submitted for censorship of content prior to their public exhibition void as against the First and Fourteenth Amendments of the United States Constitution?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 through 7 of Chapter 155 of the Municipal Code of the City of Chicago and the First and Fourteenth Amendments of the United States Constitution. They appear *infra* in Appendix A at pages 39-43. The particularly relevant section of the ordinance is Section 155-4 which reads as follows:

> "155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.
>
> If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.
>
> In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final."

STATEMENT.

The facts in this case are not in dispute and were stipulated to by the parties (R. 25). Petitioner filed its Complaint against the City of Chicago, Mayor Richard J. Daley and Police Commissioner Timothy J. O'Connor, asking the District Court to require the defendants to issue to Petitioner the permit required by the Municipal ordinance and to restrain defendants from interfering with Petitioner's right to exhibit the motion picture *Don Juan* in the City of Chicago.

Petitioner alleged and the defendants acknowledged that Petitioner has the exclusive right to exhibit the motion picture in question and that Petitioner applied for a license to so exhibit it, submitting the permit fee with its application as required. Petitioner, however, refused to submit the motion picture for censorship of content, and for this reason, the Police Commissioner refused to issue a permit. Petitioner thereupon appealed to Mayor Daley in a timely manner pursuant to the ordinance, but the appeal was rejected, again on the ground that Petitioner had failed to submit the picture for censorship of content. Throughout these administrative proceedings, Petitioner had insisted that its refusal to so submit the picture was justified because the requirement for such submission was unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Following these administrative proceedings, Petitioner commenced its lawsuit.

The trial court dismissed the Complaint on the ground that there was no justiciable controversy between the parties and, therefore, the court was without jurisdiction. 180 F. Supp. 843 (1959). The Court of Appeals affirmed the dismissal for similar reasons and for the reason that the ordinance in any event was constitutional. 272 F. 2d 90 (C. A. 7th, 1959).

Accordingly, the Record in the case is short and the only questions involved are matters of law which we submit were decided erroneously by the courts below.

SUMMARY OF ARGUMENT.

I. There is a justiciable controversy between the parties involving a substantial federal question that needs decision by this Court. The right claimed by Petitioner is the fundamental and constitutionally guaranteed right to free speech—free from any government imposed requirement that the speech, in this case a motion picture, be submitted in advance for censorship of content. This is a position which Petitioner has maintained throughout this controversy and one properly before the Court. Petitioner is not challenging the entire licensing system established by the ordinance in question but only those sections which require submission of the motion picture for censorship of content. Petitioner met every other requirement of the ordinance and has the right to make such a challenge without submitting itself to the penalties provided by the ordinance for exhibiting the motion picture without a license. The case, therefore, presents a real issue between real parties to determine whether there is any justification for denying Petitioner rights which have been confirmed as to all other media of communication.

II. The real question presented by the case is whether those sections of the Chicago censorship ordinance which require every motion picture to be submitted for censorship of content prior to public exhibition can withstand a constitutional challenge under the First and Fourteenth Amendments to the United States Constitution. Since motion pictures have become an important medium of communication, they must be treated as part and parcel of

that speech and press which are protected against government interference. The long history of litigation in the motion picture field has made it clear that censorship of ideas communicated by motion pictures can no more be tolerated than censorship of ideas communicated by newspapers, books or magazines.

None of the exceptions which have been carved out from freedom of speech and press as an absolute can be utilized to justify the ordinance in question. There is no "clear and present danger" that motion pictures, *per se*, will subvert the country or the country's morality.

The questions *not* presented by this case shed light on the question that is before the Court. Thus, the Court is not asked to strike down all licensing schemes for all purposes. The distinction is between a license which is ministerial in nature and one that is discretionary in nature. The argument is limited to the position that licensing schemes which demand censorship of content prior to the issuance of a license are discretionary and run afoul of the constitutional mandates. Similarly, this case does not present the question as to whether and by what means the state can punish an exhibitor who transgresses against proper governmental interests, whether by way of obscenity, subversion or incitement to riot. The question again is whether the governmental unit, in this case the city, can seek to defend those legitimate interests by imposing a censorship requirement on all motion pictures.

The question presented by this case is not new to the Court. It has been peripherally involved in many cases during recent years. However, the lower courts have interpreted these decisions in varying ways. In the instant case, the court below has interpreted the rulings of this Court in a manner so at variance with judicial precedent that it ought to be reversed.

ARGUMENT.

I. THERE IS A JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES INVOLVING A SUBSTANTIAL FEDERAL QUESTION.

The opinions of the court below and of the trial court are largely based on the conclusion that there is no justiciable controversy between the parties. This then becomes the threshold question of the case.

We submit that the lower courts misconceived the nature of the case. The facts, all of which are stipulated to, make it clear that Petitioner and Respondents have met head-on over the issue of whether Petitioner is entitled to exhibit its motion picture *Don Juan* without submitting it to the Chicago Censor Board for prior review and censorship of content. Petitioner contends that having tendered the license fee and having complied with other aspects of the ordinance, it was entitled to a permit since the requirement of submission for censorship of content violates Petitioner's right to free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Respondents stand on the ordinance in their refusal to issue the permit. In the stipulation (R. 25), Respondents freely admit that this refusal has directly damaged Petitioner since it is subject to fine for exhibiting the picture without a permit; Respondents contend, however, that the requirement of prior censorship is constitutional and feasible. The controversy is, then, clear-cut and, while confined to the naked question presented by this case, is real and justiciable. We believe that the holdings of the courts below may be summarized as follows:

1. *Petitioner Is in No Position to Complain Because Had It Submitted the Film, the Censor Board Might Have Approved It, and All Would Have Been Well.*

Under such a view, all censorship schemes are constitutional and a great body of judicial opinion, legal literature and constitutional history has been wasted. Such a view presupposes that since all censorship laws are valid, the only question for the courts is whether they have been properly applied. As but one example, *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), becomes obsolete. In that case Lovell was arrested for distributing literature without a permit. This Court reversed and found the ordinance unconstitutional. Under the theory of the court below, this Court should not have decided the constitutional question, since Lovell might have been issued a permit had she applied. Under the same theory, newspapers could be required to submit their copy in advance, and unless and until the censors rejected the paper, no one could complain. Carried to the *reductio ad absurdum*, the city could impose a restriction that no one could exhibit a motion picture in Chicago unless the exhibitor's genealogy was approved by the city's censors. Under the theory of the court below, every exhibitor would be required to submit his genealogy and only if the city rejected one family tree, could a complaint be made. We respectfully submit that this is not the law nor the Constitution.

In *Staub* v. *Baxley*, 355 U. S. 313, 319 (1958), the answer was given succinctly by this Court:

> "The decisions of this Court have uniformly held that failure to apply for a license under an ordinance which on its face violates the Constitution *does not preclude review* under such an ordinance. *Smith* v. *Cahoon*, 283 U. S. 553, 562." [Emphasis added.]

This Court's holding in *Baxley* stresses the principle of law that there is no *need* to submit to prior censorship as a condition precedent to alleging its invalidity. The

instant case is stronger, in that Petitioner *did* apply for a permit, but refused to waive its constitutional rights in so doing. Petitioner tendered the application fee (which may be construed as a tax and perfectly proper) but would not submit the motion picture for censorship of content. If Petitioner is correct, the challenged provisions of the ordinance cannot be enforced and Petitioner is entitled to its permit.

In *Cargill* v. *Minnesota*, 180 U. S. 452, 468 (1901), the petitioner refused to apply for a license to operate a grain elevator. Before this Court, he argued that if he sought a license, he would be obligated to comply with various provisions of the state statute which were in violation of the United States Constitution. The Court answered that argument by saying:

> "If the commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

We submit that Petitioner in the instant case explicitly followed the admonition of this Court in the *Cargill* case. It applied for the requisite license but refused to comply with unconstitutional provisions of the statute. When it was refused the license for this reason, it appealed to the courts for protection in "appropriate judicial proceedings."

2. *This Is a Manufactured, Agreed-upon Case Between the Parties.*

Nothing is further from the truth. Petitioner is in a business for profit. In the past, it has pragmatically sought to engage in the motion picture business in Chicago by

submitting its pictures for censorship. Some of the results can be found in previous litigation between the parties.

Times Film Corporation v. *City of Chicago*, 139 F. Supp. 837 (1956), 244 F. 2d 432 (C. A. 7th, 1957), rev'd *per curiam* 355 U. S. 35 (1957).

Times Film Corporation v. *City of Chicago*, U. S. District Court, Northern District of Ill., Eastern Division, 57 C 2017.

Petitioner finally determined to stand on its constitutional right to engage in its business activities without sacrificing the rights of free speech which are afforded it by the Constitution. There is no contention that Petitioner "waived" these rights by acceding to the demands of the censors in other cases, and, indeed, such a contention would be fatuous. Certainly Respondents have not cooperated with Petitioner's stand unless the threat of a fine can be viewed as cooperation. All that can be gleaned at this point is the general opinion by the court below that Petitioner has framed its case so that "the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship • • •" (R. 38). We respectfully submit that the case was brought because Petitioner earnestly contends that motion pictures must be free from previous censorship just as every other medium of communication must be free from such censorship.

3. *In Any Event, Neither the Question Presented Nor Plaintiff's Rights Are Substantial.*

The trial court stated that Petitioner "cannot *seriously* contend that prior restraint of motion pictures is, *per se*, a violation of the First and Fourteenth Amendments" [emphasis added], citing *Burstyn* v. *Wilson*, 343 U. S. 495

(1952), in support of its statement. We respectfully submit, and Petitioner is very serious, that this very statement by the trial court points up the importance of the federal question presented here. The *Burstyn* case, which we shall analyze below, makes the exhibition of motion pictures part of speech and of the press. The issue here then is whether Chicago has or has not the constitutional right to require the prior submission for censorship of Petitioner's motion picture before it can be shown publicly. We can think of no more important a question of federal law than here, where First Amendment rights have been interdicted. *Staub* v. *Baxley*, 355 U. S. 313 (1958). The number of times that this Court and other courts throughout the land have been faced with similar obstacles to the exercise of free speech heightens the importance of the question. *Burstyn, supra*, and cases following.

It is equally accepted law that there is no need for Petitioner to risk exposure to fine as provided for by the censorship ordinance for failing to obtain a permit, in order to maintain that prior censorship is invalid. This is implicit from this Court's holding *Burstyn*, where the constitutional question was heard *after* a license was applied for, granted and later withdrawn. This Court there held (at p. 499):

> "As we view the case, we need consider *only* appellant's contention that the New York statute is an unconstitutional abridgement of free speech and press." [Emphasis added.]

The fact that there was a submission to the invalid requirement in *Burstyn* does not set that case apart from the case at hand. The revocation of a permit has the same effect as denial of a permit in the first instance, at least as far as the constitutional question is concerned. If the prior censorship requirement is unconstitutional, Petitioner is fully entitled to its permit—for which it here applied—

without such submission, and the administrative action in denying the permit is properly before the Court.

In *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 352, 121 N. E. 2d 585 (1955), plaintiffs had alleged the invalidity of the prior submission requirement in the Chicago ordinance. The highest state court there held:

> "If the plaintiff, however, alleges that one or more of the conditions required for a license are invalid, he may proceed either by mandamus or by injunction. * * * Whether a complaint alleging only that a motion picture is not obscene would state a ground for equitable relief we need not decide. In the present case the plaintiffs did not so limit their complaint, for they asserted that the ordinance was invalid, and claimed the right to exhibit their film without obtaining a permit."

The court there held that the constitutional issue was properly before it, deciding that issue in favor of the prior submission requirement. (This court denied review of that decision "for want of a final judgment." 348 U. S. 979 (1955).) The court further held that each court is required to decide whether a particular picture ought, or ought not to have been proscribed. If Petitioner had here submitted to the invalid prior censorship, it would have foreclosed the constitutional issue as the trial court and appellate court would have acted as *censors de novo* pursuant to the construction which the highest state court placed on the ordinance. Such an action, however, would have required Petitioner to sacrifice the very constitutional right for which it contends.

The trial court stated that Petitioner is making a "scatter-shot" attack upon the ordinance, citing *Staub* v. *Baxley*, 355 U. S. 313, 318 (1958). In that case this Court sustained an attack against the ordinance in its entirety,

reversing the highest state court which had *declined* jurisdiction and which had stated as its reason for not deciding the First Amendment issue:

> "• • • that since it 'appears that the attack was not made against any *particular* section of the ordinance as being void or unconstitutional, and that the defendant has made no effort to comply with *any* section of the ordinance • • •'." [Emphasis added.]

Petitioner here is in even a better position than was the defendant in *Baxley* to raise the constitutional issue. Here Petitioner has complied with every single requirement set forth in the licensing ordinance—with the exception only of the prior submission requirement.

It was stated by the trial court, further, that Petitioner has suffered no immediate and irreparable harm. This disregards the Stipulation of Facts (R. 25-26), as well as the Answer (R. 15) whereby Respondents admit that Petitioner is directly damaged by virtue of Respondents' action in denying it a permit. Nothing is more damaging to a motion picture distributor than not being able to distribute its motion pictures. The value of speech is in its timely delivery.

The trial court stated that it was "hypothetical" as to whether the penalties provided for under the ordinance for exhibiting a film without a permit would be applied to Petitioner. This statement, again, contradicts the Stipulation of Facts (R. 25-26) as well as Respondents' own Answer (R. 15) whereby it is made clear beyond a doubt that the sanctions provided for in the ordinance would be brought to bear against Petitioner if Petitioner exhibited its motion pictures without a permit.

We respectfully submit that a justiciable controversy has been set forth in the case. The single issue of law presented here is whether or not Chicago can require prior censorship of motion pictures.

II. THOSE SECTIONS OF THE CHICAGO ORDINANCE WHICH REQUIRE SUBMISSION OF MOTION PICTURES FOR CENSORSHIP PRIOR TO PUBLIC EXHIBITION ARE VOID AS A PRIOR RESTRAINT ON FREEDOM OF SPEECH AND OF THE PRESS.

1. *Motion Pictures Are Part of Speech and of the Press and Cannot Be Censored in Advance of Public Exhibition.*

The dissemination of ideas by motion pictures has in recent decades become one of our accepted modes of speech and press. Among a great many factors contributing to the success story of the motion pictures as a mode of speech are scientific inventions and improvements which have made it possible to faithfully record and transmit ideas by this medium of expression. It was logical, therefore, for the courts to include motion pictures within the protective orbit of the First Amendment.

Full expression of the concept that the motion picture is a form of speech protected by the Constitution may be found in *Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502 (1952), and in *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U. S. 684 (1959).

In *Burstyn* the Court held as follows:

> "For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. * * * The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. *This Court recognized many years ago, that such a previous restraint is a form of infringe-*

ment of freedom of expression to be especially condemned. Near v. *Minnesota*, 283 U. S. 697 (1931)." [Emphasis added.][1]

The Court, in *Burstyn*, was specifically concerned with the guide pursuant to which New York banned motion pictures which the censor considered sacrilegious. In the cases subsequent to *Burstyn*, the Court has either struck down the criterion before the Court under which censorship had been imposed on the exhibition of motion pictures or has found the motion picture not proscribed by such criterion.

Gelling v. *Texas*, 343 U. S. 960 (1952).

Commercial Pictures Corporation v. *Regents of the University of New York*, 346 U. S. 587 (1954).

Superior Pictures, Inc. v. *Department of Education*, 346 U. S. 587 (1954).

Holmby v. *Vaughn*, 350 U. S. 870 (1955).

Times Film Corporation v. *City of Chicago*, 355 U. S. 35 (1957).

In *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959), the Court again emphasized that the basic prin-

1. Virtually every medium of communication has at one time or other been the subject of the censor's attack. This Court has persistently repelled these efforts:

NEWSPAPERS: *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Company, Inc.*, 297 U. S. 233 (1936); BOOKS AND MAGAZINES: *Winters* v. *New York*, 333 U. S. 507 (1948); *Hannigan* v. *Esquire Inc.*, 327 U. S. 146 (1946); PAMPHLETS AND HANDBILLS: *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); TELEVISION: *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C. A. 3d, 1950); cert. den. 340 U. S. 929 (1951); SPEECH ON THE PUBLIC STREETS AND PARKS: *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939).

ciple of law which protects speech from state invasion applies to motion pictures:

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea. * * * Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty."

Since this Court was not required, in *Burstyn*, nor in any of the other cases subsequent to it, to base its holding on the validity *per se* of a requirement of prior submission of a motion picture to a Board of Censors, an important question of federal law involving First Amendment rights is now beclouded. In the progeny of litigation following the *Burstyn* case, lower courts have interpreted that holding to mean a great variety of things. Massachusetts' highest court held that no prior censorship is valid. *Brattle Films* v. *Commissioner of Public Safety*, 127 N. E. 2d 891 (Mass., 1955). Other lower courts have voided censorship of motion pictures on the ground that the enabling act was not tightly drawn. *Hallmark Productions* v. *Carroll*, 121 A. 2d 584 (Pa. 1956). In *RKO* v. *Department of Education*, 122 N. E. 2d 769 (Ohio, 1953), the Ohio court held that this Court's decision in *Superior Pictures, Inc.* v. *Department of Education*, 346 U. S. 587 (1954), meant that every order whereby a censor banned a motion picture was unreasonable and arbitrary, although it held further that this Court did not, in the *Superior* case, void Ohio's enabling act. Most lower courts, however, have limited their holdings to a determination whether or not the enabling statute setting up censorship of motion pictures was more, or less, tightly drawn than those standards which this Court voided in the *Burstyn* case and in the subsequent cases.

In the Illinois Supreme Court, the view was expressed that the "precise scope [of the *Burstyn* holding] is not

easy to determine." Yet it was concluded by that court that censorship was proper if the ordinance was so construed as to exclude the showing of "obscene" motion pictures. *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 342, 121 N. E. 2d 585 (1955). That court stated, further, that this Court's holding in *Burstyn* did not completely "immunize" motion pictures from censorship under the Chicago ordinance as construed by that court, so long as there was full judicial review of the censor's action. It is this question which is squarely before the Court.

The effect of the state court's holding in the *American Civil Liberties Union* case is not only that every court of review becomes a court of censors, but, in addition, each court might be required to determine *on more than one occasion* whether the identical motion picture had received due process under different standards.

If the state court's view in so interpreting this Court's holding in *Burstyn* is correct, then eventually this Court as well as the lower courts, may be required to see the identical motion picture on numerous occasions to determine in each instance whether a different standard gave due process. Ultimately, the censor could perpetually exclude a motion picture by application of semantics—proscribing under standard 2 the same motion picture which had been viewed under standard 1, and so forth *ad infinitum*.

Indeed, this is exactly what happened in the *American Civil Liberties Union* case. The case involved the motion picture entitled *The Miracle*—the very picture involved in the *Burstyn* case. Following the *Burstyn* case, the Chicago censors concluded that *The Miracle* was obscene and banned it. The trial court reversed the censors. The Illinois Supreme Court then construed the ordinance and reversed

and remanded for further proceedings. 3 Ill. 2d 334, 121 N. E. 2d 585 (1955). This Court refused to review the case for want of a final judgment. 348 U. S. 979 (1955). The case thereupon went back to the trial court and on this second go-around, the trial court (with a different judge) found the motion picture obscene and upheld the censors. The Illinois Appellate Court thereupon reversed the second trial court and found the picture not obscene. 13 Ill. App. 2d 278 (1957). At this point, the city apparently tired of the controversy and issued a permit, but *The Miracle* was never publicly exhibited in Chicago. Some five years elapsed between the original action of the Censor Board until the permit was finally ordered issued.

Previous litigation between these same parties further illustrates the point. One of the motion pictures involved was entitled *Game of Love*. The censors banned it as obscene. Suit was filed in federal court and was referred to a Master in Chancery. He took extensive testimony and found the picture not obscene. On objections to the District Court, the trial judge impaneled a jury advisory in nature (since it was an equity case) who were told to view the movie and determine whether or not it was obscene. There was no *voir dire* and no instructions were given the jurors. They voted 11 to 1 that the motion picture was obscene. The trial judge agreed with them and reversed the Master's findings. *Times Film Corporation* v. *City of Chicago*, 139 F. Supp. 837 (1956). The Court of Appeals for the Seventh Circuit upheld the trial court. 244 F. 2d 432 (C. A. 7th, 1957). This Court reversed, *per curiam*, citing *Burstyn*, 355 U. S. 35 (1957).

We cite the above as but two examples of how the state courts' interpretation of this ordinance makes every judge an original censor, in some instances, many times over. Indeed, since the Censor Board itself claims the power to order deletions, the courts' role can be held to include this

function as well. Wholly apart from the uncomfortable role in which the courts are placed because of the curious combination of constitutional problems in a context of administrative censorship, the results under this procedure reaffirm the wisdom of the constitutional fathers when they stated that "Congress shall make no law * * * abridging the freedom of speech, or of the press. * * *" Their long experience with the official *imprimatur* made them painfully conscious that government officials should not decide what the people can read or say in the first instance. We submit that the stricture holds true even when judges are made a part of the process. We submit that the *Burstyn* case did not contemplate such a result.

That this Court takes no such view of its holding in the *Burstyn* case is inherent from its subsequent decisions in the motion picture field. Similarly, this Court has struck down every prior censorship requirement with regard to every other medium of expression. It follows that where, as here, the very submission requirement is challenged, this Court will set it aside as contrary to the First and Fourteenth Amendment.

2. *Censorship of the Ideas Communicated by Speech or the Press Has Never Been Allowed.*

The pernicious and stultifying evil of a prior discretionary license as a prerequisite for the expression of ideas has been recognized by our philosophers, our statesmen and our courts since the inception of our government. The First Amendment expresses this concern for the preservation of freedom of speech and of the press in terms of a terse, negative command. This Court has held that freedom of speech and the press is equally protected from invasion by the state, being safeguarded by the Due Process clause of the Fourteenth Amendment against such invasion.

Gitlow v. *New York*, 268 U. S. 652 (1925) and cases following. This principle of constitutional law is set forth in the landmark case of *Near* v. *Minnesota*, 283 U. S. 697, 713 (1931) where the Court, in striking down a prior censorship scheme imposed by a state, held:

> "The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, *it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.* • • • The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censors for criminal matter when published'." (Emphasis added.)

Following the decision in *Near*, this Court has consistently struck down any and all censorship attempts made in violation of the *Near* holding. Today, there can be no question but that the general constitutional yardstick set forth in *Near* applies equally where the speech takes the form of motion pictures, even as a business enterprise. In *Smith* v. *California*, 361 U. S. 147, 152 (1960), this Court made this clear beyond doubt, when it held, in citing the *Near* case:

> "It is too familiar for citation that such has been the doctrine of this Court, in respect of these freedoms ever since [*Near*]. And it also requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar application of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Grosjean* v. *American Press Co.*, 297 U. S. 233."

Among the statutes voided by this Court under the First and Fourteenth Amendments as invalid prior censorship schemes are those which imposed restraints by their *terms*, as well as those which had the *effect* of inhibiting speech. The Chicago ordinance by its terms falls in the class of enactments which impose an invalid restraint by its terms.

In *Lovell* v. *City of Griffin*, 303 U. S. 444, 451 (1938), an ordinance proscribed the distributing of handbills without a prior permit from an administrative official. The Court emphasized the general rule applied, stating:

> "The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. * * * The ordinance embraces 'literature' in the widest sense."

Compare the terms of that ordinance to those of the Chicago ordinance, which embraces motion pictures in their widest sense. This Court in *Lovell*, held further:

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."

Similarly, in *Cantwell* v. *Connecticut*, 310 U. S. 296, 305, 306 (1940), the Court voided a statute which by its terms prohibited the solicitation of moneys for religious causes without prior approval in writing of an administrative official. This Court there held unanimously:

> "Such a censorship * * * is a denial of liberty. * * * [T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

Smith v. *California, supra,* illustrates a situation in which a statute inhibited speech, although not restraining it by its terms. The statute made it unlawful, among other things (at p. 153),

> "[for] any person to have in his possession any obscene or indecent motion picture film in any place where motion pictures are sold or exhibited."

The Court added that this was an example of legislation to be doomed because it had the "collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it * * *."

The Court added that:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98."

Without in any manner diminishing the gravity of the burden the statute in *Smith* had sought to impose on freedom of speech, it is submitted that the burden imposed by Chicago's censorship requirement is even a far greater one. That burden is here compounded by the fact that we are dealing with discretionary licensing in the form of administrative censorship, as opposed to a penal statute such as was voided in *Smith.* If such burden is not tolerated in the form of a penal statute, then *a fortiori* it cannot stand when in the form of discretionary licensing as is present here.

This Court reached a similar decision in voiding the penal statute in *Thornhill* v. *Alabama,* 310 U. S. 88, 97 (1940), holding that:

> "The power of the licensor against which John Mil-

> ton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. *It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*" [Emphasis added.]

As recently as this last term, in *Talley* v. *California*, 362 U. S. 60, 62 (1960), this Court struck down a Los Angeles ordinance which prohibited distribution of literature which did not state the name of the author and distributor. In so doing, the Court reviewed the other handbill cases in which state and city licensing schemes have been struck down and found the Los Angeles ordinance parallel since

> "such an identification requirement would tend to restrict freedom of distributable information and thereby freedom of expression."

Thus it is clear that this Court has voided even those enactments which had the collateral effect of inhibiting free speech and press, although not requiring submission for censorship of content to an administrative official. Where the speech is inhibited, as here, by the requirement of prior submission, it is plain that such a requirement is absolutely void.

What is the effect on a distributor of motion pictures who reviews the case history of *The Miracle* or of *The Game of Love*? We submit that the censor's threat is pervasive and consistent. It does not require a crystal ball to suspect that many distributors may well by-pass Chicago rather than run the gamut of the Censor Board and the courts of review.

It is true that this Court has at times upheld "licensing", as in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941);

Poulos v. *New Hampshire*, 345 U. S. 395 (1953), or as in *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). Indeed, licensing, *per se*, is not challenged by Petitioner in the instant case. We readily concede that if the Chicago ordinance is viewed solely as a tax measure or as a safety measure to guard against fires, no First or Fourteenth Amendment problems arise. But such licensing schemes as were upheld in the line of cases cited above or as would remain in the instant ordinance if the prior submission requirements were declared void rest upon a wholly different premise. In each of the above instances, there was a reasonable regulation as to the time, place or manner of the dissemination of speech.

In none of the statutes where licensing was upheld did an administrator have control over the *content* of the speech. Ministerial licensing, as distinguished from discretionary censorship, was described as follows in *Niemotke* v. *Maryland*, 340 U. S. 268, 282 (1951), in the concurring opinion of Mr. Justice Frankfurter:

> "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like. Again, a sanction applied after the event assures consideration of the particular circumstances of a situation. The net of control must not be cast too broadly."

We recognize that it is tempting for a community to use the more efficient and certain means of censorship to protect against the social evils that supposedly exist in the content of a communication. Thus the court below answered Petitioner's contention that the city's power was limited to punishment after the fact by stating (R. 14):

> "If that contention is correct, thus barring censorship before a film is exhibited in public theatres, actual prior restraint will scarcely exist as to the ex-

> hibition of a film in theatres. While it is common knowledge that the responsible owners of newspapers and television broadcasting systems respectively exercise a wholesome, voluntary censorship over newspapers and television, no similar regulation of the exhibition of moving picture films in theaters is as effectively exercised by private industry. The arrest and prosecution of employees of theaters who exhibit films charged with obscenity, inciting to riot, and the other proscriptions mentioned in the ordinance under consideration, is at most a theoretical remedy of prevention."

The same point was made by the state court in the *Near* case when it stated that prosecutions to enforce penal statutes for libel did not result in "efficient repression or suppression of the evils of scandal." *Near* v. *Minnesota*, 283 U. S. 697, 711, 722 (1931). The Court answered that defense by stating:

> "There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication."

Even the dissent in *Near* by Mr. Justice Butler agreed that this temptation for "efficient" licensing system must be resisted. The dissent there argued that the Minnesota statute was not a prior restraint in that there had been previous publication without any submission or restriction. We submit that it is fair to say that under the reasoning of both the majority and the dissent in the *Near* case, the Chicago ordinance would fall insofar as it requires prior submission of *all* motion pictures for censorship of content.

What has been said in the *Near* case about newspapers must apply to motion pictures. However great the temp-

tation to rely on censors to say what is good for our morality, the effects of yielding to such temptations are disastrous.

What is the social danger that the Chicago ordinance seeks to prevent? Are Chicagoans more susceptible to immorality than Washingtonians or San Franciscoans? Are the censors aware of what the social dangers are against which they are protecting? The ordinance and Respondents are silent.

The record in one of the previous cases involving these parties reveals some curious answers on the part of the administrative officials. The record was before this Court in *Times Film* v. *City of Chicago*, 355 U. S. 35 (1957), and the references in this paragraph are to that record (GR). Thus the Commissioner of Police stated that the film *Game of Love* was obscene because it aroused in him a desire to be with his wife (GR. 564). Is this the evil that Chicago censors are fighting? One of the censors stated that her job was to protect the weakest member of society (GR. 142). Is this the standard of film fare which distributors can constitutionally exhibit? Is this the maximum allowable to Chicago movie-goers? Another censor stated that she called them as she saw them (GR. 193). Is this the final result of the judicial tumult as to the definition of obscenity and the preciseness of standards to be applied? Another censor said her job was to see that Chicagoans get "educational entertainment" (GR. 145). The Illinois Supreme Court defined obscenity (in part) as matter which tended to arouse the sexual desires of an average normal person. All of the censors denied that their sexual desires were aroused by *Game of Love*. Did this mean that they ignored the standard or does it reflect on their capacity to censor?

We cite the above as examples not of the particular quality of Chicago censorship but rather of the practical

basis on which the restrictions against prior restraint rest. We think that record stands as an indictment of all prior censorship everywhere. We submit that the questions answered by the censors are best answered by the movie-going public. In most such questions, the state can have no interest. Where its interest does appear, it has the means for protection.

The states must rely on their traditional powers of punishing for transgression *after* the transgression. In Illinois this takes the form of a criminal statute prohibiting the exhibition of pornography. Ill. Rev. Stat. (1959), c. 38, § 470. That remedy has far different effects than the ordinance in question. First, it does not interfere with the initial communication. Second, if the governmental authorities determine that the communication *does* trespass on vital community interests, the prosecuting attorney must persuade a grand jury, a petit jury and a judge of that fact, with all the traditional and procedural safeguards of our criminal law placed around the defendant. It is no doubt true that there are few convictions. We submit that this was the result contemplated by the Constitution. Doubts are to be resolved in favor of the communication and the very "inefficiency" of the criminal law remedies are the protection against unwarranted interference with speech. We think that Mr. Justice Douglas summed up this proposition in his concurring opinion in *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U. S. 684, 697 (1958), when he stated:

> "• • • censorship of movies is unconstitutional, since it is a form of 'previous restraint' that is as much at war with the First Amendment, made applicable to the States through the Fourteenth as the censorship struck down in *Near* v. *Minnesota*, 283 U. S. 697. If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. *I can find in the*

First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play or previewing a movie."

3. *The Exhibition of Motion Pictures Presents No Such Exceptional Problems as Would Justify Prior Censorship.*

The court below listed a number of allegedly undesirable matters which Petitioner's motion picture might portray (R. 39).

> "Among these undesirable matters, the lower court lists the following: It might be a *portrayal* of a school of crime which, for instance, teaches the steps to be taken and successfully carried out in the assassination of a President of the United States as he leaves the White House, or *shows* how to arrange an uprising of subversive groups in one of our cities." [Emphasis added.]

This was an obvious attempt to equate the exhibition of motion pictures with these rare exceptional circumstances in which interference with speech had been allowed.

This Court in *Near, supra,* indicated that some restraints may be validly imposed. The Court there emphasized, however, that such restraint may only be applied in the most exceptional cases. These exceptions to the rule against restraint of press and publications have been allowed only in those rare instances where the expression is the obvious and demonstrable cause of some imminent and substantive evil to the State. It is patently absurd to contend that a whole mode of communication such as the motion picture creates an evil so overwhelming as to justify discretionary licensing.

This Court has made it quite clear that mere apprehension of a danger or fear does not justify suppression of speech. It is, therefore, not sufficient merely to state,

as does the lower court, the possibility of such a danger. A substantive evil must be shown to exist, its imminence must be apparent, and its gravity must be serious. In *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), the Court stated this as follows:

> "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In *Dennis* v. *United States*, 341 U. S. 494 (1951), and in *Yates* v. *United States*, 354 U. S. 298 (1957), the Court was principally concerned with the degree and burden of proof and the showing of proximity of result which the government was required to sustain in order to meet the constitutional requisite for convictions where speech was restrained. These requirements included the need to satisfy the trial court and the jury and every appellate court that the defendants "intended to overthrow the Government 'as speedily as circumstances would permit'"; that "the requisite danger existed"; and, that "the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. 494, 509-10.

From all these questions it is clear that restraint of speech is justified only if it is plain that it is the imminence of some breach of the public order that gives rise to the penalty, and not the views expressed or the content of the speech. In addition, there must be substantial affirmative proof of the presence or imminence of a substantive evil directly resulting from the words being published.

The face of the Chicago ordinance here in question is defeating on both these constitutionally required requisites. Pursuant to the terms of the ordinance, the penalty is

imposed exclusively for showing a motion picture without a permit. The ordinance proscribes all motion pictures, and by its terms there need be no showing of any evil directly resulting from the exhibition of the motion picture. If the failure to meet the constitutional requisites could bar subsequent punishment, as was said in *Dennis* and *Yates*, then *a fortiori* their disregard must void the prior censorship scheme here present.

The Court has said that the basis for the exception to free speech must be clear and convincing. The Chicago ordinance puts the shoe on the other foot, giving literal interpretation to Holmes' statement that "Every idea is an incitement." *Gitlow* v. *New York*, 268 U. S. 652, 673 (1925). There, every motion picture is *presumed* to be clearly and presently dangerous unless the censors are satisfied that it is not. Even the court below anticipates that the motion picture involved is obscene, stating (R. 40):

> "Although plaintiff, evidently for strategic purposes, refuses to take a stand which will reveal the contents of the film, certain arguments in its brief point strongly to the fact that the film is one subject to a charge of obscenity."

We see no reason why the city should be indulged in a presumption that because a communication is contained on celluloid, it is suspect and excludable until the city is satisfied that it is a fit communication.

The lower court lists a number of allegedly undesirable matters which might be depicted by petitioner's motion picture (R. 39). Among these, the lower court includes *inter alia*: "(a) An immoral or obscene act; (b) Exposure of the citizens of any race, creed or religion to contempt, derision, or obloquy by attributing to them depravity, criminality or lack of virtue; and, (c) Acts tending to produce a breach of peace or riots" (R. 41).

A review of the cases in this Court which have considered the limits of community control of speech make it clear that under certain circumstances, the speaker's message may be punished if it contains any of the ingredients as alleged by the court below. This Court has held that obscenity, libelous statements, and incitements to riot do not enjoy the protective scope of the First Amendment. *Alberts* v. *California,* 354 U. S. 476 (1957) (obscene speech); *Beauharnais* v. *Illinois,* 343 U. S. 250 (1952) (libelous statements); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). But these cases make it equally clear that the limits of the community control are to restrain the message *after* it has reached the public forum.

In *Alberts,* the statute was aimed at punishing obscene speech. It was in the form of a penal law, with all its attendant judicial safeguards. None of these judicial safeguards are present in the ordinance before the Court. In *Alberts,* even with the presence of these judicial safeguards in a subsequent punishment statute, the Court emphasized that there had to be a carefully worded charge to a jury before a conviction could be sustained.

We in no way *concede,* of course, that the presence of these judicial safeguards, no matter how important their presence, could save the Chicago ordinance. The core of the Chicago ordinance is that it prevents speech in the form of motion pictures to reach the public forum. The statute upheld in *Alberts* does not so prevent the message from reaching the community. The message there is restrained only *after* it is disseminated.

The criminal libel statute sustained by this Court in *Beauharnais* is another illustration of permissible community control. Once again the difference in both aim and effect between the statute there sustained on the one hand, and the Chicago censorship ordinance on the other, is read-

ily apparent. The Illinois criminal libel statute was aimed at preventing breeches of the peace. The Chicago censorship ordinance is aimed merely at preventing the showing of motion pictures without a permit. In the case of the Chicago censorship ordinance, the net effect is to interdict the exhibition of all motion pictures. Not so in the *Beauharnais*-type law, which does not impose any previous restraint whatever. In addition, a conviction under *Beauharnais* is *not* for the speech itself, but rather for the effect of the speech in terms of imminent action.

The limits of permissible community control, if a motion picture is a picture of "acts tending to produce a breech of the peace or riots" (R. 39), are indicated by the type of statute upheld by this Court in *Chaplinsky*. The statute provided that "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street • • • *with intent* to deride, offend or annoy him • • •" [emphasis supplied] 315 U. S. 568, 569 (1942). Again, this type of statute imposes a completely different type of restraint than does Chicago by its prior submission requirement. In *Chaplinsky*, no one stopped defendant from delivering his message. No one censored his speech. Furthermore, the record in that case makes it crystal clear that he was requested to discontinue speaking because of the extreme likelihood that his speech would lead to a breach of the peace and that such breach of the peace was indeed imminent.

The above cases show that, even where subsequent punishment is concerned, this Court has required the presence of elements which Chicago has not even alleged to exist, and which Chicago could not allege until such time as Petitioner's motion picture has been publicly shown.

Once again, however, we are met with the argument of convenience and efficiency. Thus the lower court opines

that the judicial process is an insufficient remedy to cope with the exhibition of motion pictures, stating:

> "A film which incites a riot produces that result almost immediately after it is shown publicly. Likewise, the effect upon the prurient mind of an obscene film may result harmfully to some third person within hours after the film has been shown." (R. 42.)

If the lower court thereby suggests that the motion picture is a more effective medium for the dissemination of ideas, this can hardly be a constitutional basis for applying to speech by motion pictures another rule of law as is applied to the other modes of speech. This Court held in *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959):

> "* * * in the realm of ideas it [the First Amendment] protects expression which is eloquent no less than that which is unconvincing."

Insofar as the speed with which a harmful *effect* may result after viewing of a motion picture, this is a highly conjectural matter which can certainly be no constitutional basis for differentiating one medium from another. In fact, recent studies by students of human behavior patterns have borne out the impossibility of distinguishing the impact created from seeing a motion picture, from the impact left on the recipient of speech in some other form. Jahoda, The Impact of Literature (New York University, 1957), at p. 44. We submit that it is impossible to predict, for example, whether the impact of Petitioner's motion picture, were it to be shown by means of television in Chicago, is greater than, equivalent to, or less than the impact that would be generated by its showing in a theatre. Yet, Petitioner is at liberty to so show its motion picture by means of television. *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C. A. 3d, 1950). No one need submit any

copy to publish or distribute *Don Juan* in book or magazine form.

The basis for the adoption of the First Amendment is illustrated by a statement made by Jefferson, "Statute for Religious Liberty," 12 Hening's Statute, Virginia, 1873, Ch. 34, p. 85:

> "* * * it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."

The alleged dangers which the lower court suggest as a justification for prior censorship of motion pictures exist no less in the vast majority of our states and cities where no such prior censorship of motion pictures is present. In addition to Chicago, only a handful of cities and four states (New York, Virginia, Kansas and Maryland) impose prior censorship on motion pictures, ("Entertainment: Public Pressures and the Law," 71 Harv. L. Rev. 326, 334-35 (1957)). The court may take judicial notice that the standard of morality is at least as high in the vast number of states and cities which have no motion picture censors, as it is in Chicago.

The entire basis for preventing speech is less than thin. Most motion picture censorship schemes are justified (as in this case) on the notion that a viewing of a motion picture will cause some anti-social conduct.

As an example, one of the standards prohibits obscene films. Forgetting all problems of definition, the objection to obscenity, if it is to be used to sustain an exception to freedom of speech, must be that some one viewing the obscene movie will commit some anti-social sexual act. However, Kinsey in his work *Sexual Behavior of the Human Male* (W. B. Saunders Company, 1948), stated:

"There are ever present stimuli to heterosexual re-

> sponse. * * * For most males whether single or married there are ever present erotic stimuli, and sexual response is regular and high."

Among young boys all sorts of "normal" stimuli evoke erotic responses. These include such things as swimming, sitting in church, sitting in warm sand, listening to the national anthem and fast elevator rides. Kinsey *ibid* pp. 164, 165. Thus even if the arousal of sexual desires can be considered undesirable (but see Judge Frank's opinion in *Roth* v. *Goldman,* 172 F. 2d 788, 792 (C. A. 2d, 1949)), the city cannot establish that motion pictures, or even *some* motion pictures have that effect.

The above merely points out the difficulties that the state must overcome if it is to justify even *punishment* for speech. We submit that there can be *no* justification for stopping the speech in advance of its being made. What we have said about the standard of obscenity in the Chicago ordinance applies equally to all the other standards set forth in the ordinance. Who are the great semanticists and psychologists who will determine in advance what words will create the social dangers which the state has a legitimate interest in preventing? We submit that it is neither Chicago censors nor any other pre-censorship authority.

On August 2, 1960, the Court of Common Pleas of Dolton County, Pennsylvania, declared the new Pennsylvania motion picture censorship act unconstitutional. (*Twentieth Century Fox Films Corporation* v. *Boehm, et al.,* No. 2887 in Equity.) The opinion of the court thoroughly reviewed the history of motion picture censorship. In commenting on the fallibility of any censorship authority, the court said as follows:

> "It is fundamental that the heart of our political system is a refusal to recognize an intellectual elite with power to dictate the public taste and morality.

> The people are very jealous of their basic rights, even to their elected representatives, and we believe that the general public in the exercise of discretion and with their innate sense of decency can best impose restrictions by their attendance or non-attendance at motion picture theaters as to what is right and what is morally wrong. Right or wrong, wise or unwise, the people have insisted that they be judged by their peers, that is, a cross-section of the community as distinguished from a selected, 'superior' segment of the populace."

We think that the above statement aptly describes Petitioner's point of view.

We submit that if Respondents wish to exclude unprotected speech in the form of motion pictures from Chicago, they must abide by the limits of the permissible scope of community control which this Court has imposed on states in the valid exercise of the police powers. If, therefore, Petitioner's motion picture contains any of the elements which the lower court has listed as proper for restraint (and we do not admit that the motion picture does contain any such elements), Respondents can seek to invoke the criminal process against Petitioner *after* the communication. Whatever the remedy may be, whereby Petitioner's motion picture might be lawfully restrained,

> "* * * it is to be closely confined as to preclude what is commonly known as licensing or censorship." *Kingsley Books* v. *Brown*, 354 U. S. 436, 441 (1957).

CONCLUSION.

The lower court failed to see the substantial federal question presented by the issue of this case. It stated:

> "* * * the motion picture not being before the Court, no hypothesis will be assumed to apply to its *contents.*" (R. 42.) [Emphasis added.]

We submit that no hypothesis is necessary.

The basic issue of the case is much greater in scope than the question of whether or not this particular motion picture would have been licensed, had it been submitted for previous censorship pursuant to the ordinance. This basic issue cuts at the core of the liberty of expression which the framers of the Constitution made part of that Constitution. This liberty indeed antedates the Constitution. The liberty to speak without discretionary license was in effect when James Franklin criticized the government and the grand jury refused to indict him (Duniway, The Development of Freedom of the Press in Massachusetts, London, 1906, pp. 97-103). The same freedom of the press was in effect when a jury acquitted John Peter Zenger for the alleged libeling of the Crown.

Thus, at the time of the enactment of the First Amendment the choice had already been made in favor of freedom of expression and against the licenser. Thus, before and after the First Amendment, all deliberate attempts to impose such prior censorship have been struck down.

Attempts at prior restraint have received their sharpest setbacks when they seek to impinge in the fields of literature or art. As was stated in *Hannegan* v. *Esquire*, 327 U. S. 146, 158 (1946):

> "A requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."

The late Judge Frank wrote in his concurring opinion in *United States* v. *Roth*, 237 F. 2d 796, 825 (C. A. 2d, 1956):

> "To vest a few fallible men * * * with vast powers of literary or artistic censorship, to convert them into what J. S. Mill called a 'moral police', is to make them despotic arbiters of liberty products. If one day they ban mediocre books as obscene, another day they may do likewise to a work of genius. Originality, not too plentiful, should be cherished, not stifled."

The very court below in another case in which they reversed the Chicago censors stated (*Capitol Enterprises, Inc.* v. *City of Chicago*, 260 F. 2d 670, 672 (C. A. 7th, 1958)):

> "Little has been authoritatively written explaining 'prior' or 'previous' restraint, instead those words are frequently found as part of an incantation used when some censorship determination is judicially annulled. Whether those words work the annulment or if annulment requires such words is difficult of discovery. But, there is a wide chasm between censoring motion pictures before deciding if they can be publicly exhibited and exhibiting a picture to the public for which criminal punishment might be imposed. In the latter situation all the familiar procedural safeguards come into play while in the other instance there are no procedural safeguards and communication is choked off at the threshold. Submission to compulsory censorship as a condition precedent to public exhibition is undoubtedly more facile unencumbered, as it is, by any procedural safeguards. Complete censorship, as we now have before us, is much like the case of obtaining indictments before a grand jury—no defense counsel is present. There, however, the analogy ends for persons accused of crime are eventually accorded some rights, but in censorship social context may be measured by six or seven persons against, as here, a society of more than approximately 3,620,962 persons, and the applicant for a permit apparently need never be heard, nor is the right to trial by petit jury available."

We respectfully submit that the choice was made by the framers of the First Amendment for liberty of expression and against previous restraints; that this choice has been upheld by this Court in every single instance where the issue has been before it; and that Chicago is bound by this choice and cannot choose ever again. The First Amendment was meant to apply to *all* media of speech. It applies to speech disseminated by motion pictures.

In the light of the above, we urge that the Court void the sections of the Chicago licensing ordinance requiring prior censorship of motion pictures as standing in the way of freedom of expression guaranteed by the First and Fourteenth Amendments. The decision of the lower court should be reversed.

Respectfully submitted,

FELIX J. BILGREY,
144 W. 57th Street,
New York 19, New York,

ABNER J. MIKVA,
231 South La Salle Street,
Chicago 4, Illinois,
Attorneys for Petitioner.

APPENDIX A.

MUNICIPAL CODE OF THE CITY OF CHICAGO.
C. 155, § 155-1 to 155-7.

EXHIBITION.

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the commissioner of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the commissioner of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provisions of this code.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's

exhibition of each picture or series of pictures without a permit. [Amend. Coun. J. 12-21-39, p. 1396.]

155-2. Before any such permit is granted, an application in writing shall be made therefor, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the commissioner of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted, it shall be in writing and in such form as the commissioner of police may prescribe.

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued.

155-4. Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final.

155-5. In all cases where a permit for the exhibition of a picture or series of pictures has been refused under the provisions of the preceding section because the same tends towards creating a harmful impression on the minds of children, where such tendency as to the minds of adults would not exist if exhibited only to persons of mature age, the commissioner of police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of twenty-one years; provided, such picture or pictures are not of such character as to tend to create contempt or hatred for any class of law abiding citizens.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to allow any persons under the age of twenty-one years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

Any person violating any of the provisions of this section shall be fined not less than ten dollars nor more than twenty-five dollars for each offense, and the admission of each person under twenty-one years of age, or permission to remain or such person under twenty-one years of age, shall constitute a distinct and separate offense.

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theater, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering

such theater, hall, room, or place at any time when any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time.

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor, provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor is first duly mailed by the transferee or lessee to the commissioner of police. Any number of transfers or leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the commissioner of police.

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit, and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city.

CONSTITUTION OF THE UNITED STATES
FIRST AND FOURTEENTH AMENDMENTS.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.